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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1251

FERNANDO QUIÑONES JIMENEZ
Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BENICIO F. SANCHEZ,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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No. 1251

FERNANDO QUIÑONES JIMENEZ
Petitioner and Appellant Below,

vs.

THE UNITED STATES OF AMERICA,
Respondent and Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Supreme Court of the United States;
Your Petitioner respectfully shows:

I

Summary Statement of the Matter Involved

The defendant, appellant, Fernando Quiñones Jiménez, charged with two violations of the Federal Firearms Act (Title 15, U. S. C. 902 (e)), consisting in that the defendant, appellant, Fernando Quiñones Jiménez, on or about May 15, 1943, in Caguas, Puerto Rico, in the District of Puerto

Rico and within the jurisdiction of this Court, who then and there was under indictment for a crime of violence in the District Court for the Judicial District of Humacao, Puerto Rico, to wit, Criminal Case No. 18,262, for first degree murder, did, unlawfully, knowingly and willfully, transport, in and within the territory of Puerto Rico, a firearm and certain amount of firearm ammunition, that is to say, approximately six bullets of revolver or pistol ammunition (R. 1, 2, 3).

A demurrer was filed by defendant, appellant, against the indictment alleging in substance that the indictment does not show facts sufficient charging a crime, that a person in Puerto Rico is charged by an information of the District Attorney and not by an indictment of a grand jury and the defendant at the time of the alleged offense had a valid legal license to carry a revolver (R. 3). The Court denied the demurrer and held, as there is no grand jury in Puerto Rico and all prosecutions for felony start with the filing of an information by the District Attorney, the indictment is sufficient (R. 4).

The defendant, appellant, then filed a motion to strike the entire jury panel, alleging in substance that the same was not drawn in accordance with law and in violation of Sections 411, 412, 413 and 415, Title 28, U. S. C. A., in that: the clerk and jury commissioner deliberately and intentionally excluded from the jury list women on the ground of sex; that the clerk and the jury commissioner excluded from the jury list all persons of the colored race, and: that the clerk of the Court and the jury commissioner excluded from the jury list all persons who work for a daily wage. Evidence was submitted to sustain that motion (R. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19) and the Court denied the motion. All the evidence clearly shows that the clerk and jury commissioner excluded intentionally women from the jury list and no wage earners appears in the jury

list, and few persons of the colored race are in the jury list.

A trial was held by jury and a verdict was rendered against the defendant, appellant, finding him guilty on both counts (R. 19). Motions for a new trial and in arrest of judgment were timely filed and argued (R. 126, 127 and 128).

The defendant, appellant, herein was sentenced to serve a term of four years in the first count and four years in the second count, said sentences to run consecutively, that is, that upon the expiration of the service of the sentence imposed on the first count, the sentence imposed on the second count to commence, but the execution of the sentence imposed on the second count to be suspended and defendant placed on probation for a period of five years (R. 129).

An appeal from said verdict and judgment was taken by defendant, petitioner herein, to the Circuit Court of Appeals for the First Circuit (R. 136).

The defendant, petitioner herein, though he elected not to serve pending appeal, has been in the District Jail at San Juan, Puerto Rico, since September, 1946.

The Circuit Court of Appeals for the First Circuit affirmed the judgment of the District Court of the United States for Puerto Rico (Judgment of the Circuit Court of Appeals, Transcript of Record 143).

The principal questions involved in said appeal were:

1. That the Court erred in overruling the demurrer.

2. That the Court erred in denying the motion to strike the entire jury panel.

3. That the Court erred in denying the motion in arrest of judgment.

4. That the Court erred in denying the motion for a new trial.

5. That the Court erred in denying the motion for a directed verdict, at the close of the case by the Government.

6. That the Court erred in admitting in evidence, over the objection of the defendant, the alleged copy of the information filed by the District Attorney of Humacao, Puerto Rico, against Fernando Quiñones Jiménez, entitled Criminal No. 18,262.

7. That the Court erred in not granting the motion of the defendant for a mistrial on the ground that the District Attorney arguing the case before the jury made the statement that a witness has testified that the defendant tried to change her testimony.

8. That the Court erred in not granting another motion of the defendant for a mistrial on the basis of the statement made by the District Attorney, that relatives of the defendant have—approached the petit jury trying to influence their decision, said argument creating serious prejudice and coercion on the petit jury.

9. That the Court erred in instructing the jury as follows:

"In Puerto Rico you have an indictment by information under the federal system, and under the system in the States we have indictment by grand jury, but it is all an indictment on a charge of crime."

10. The Court erred in instructing the jury as follows:

"Now gentlemen of the jury, what does it mean to transport something? I want to make that clear to you. When you say that a person shall not transport, that does not mean that he shall not carry it from San Juan to Caguas. It means, and the offense is complete, when he makes a forward movement moving the forbidden thing from one place to another. The transportation does not have refer-

ence to distance. It may be a short distance, it may be a considerable distance; but did he transport it? Did he know it was in the truck, and he driving the truck? Maybe he didn't see it. If he knew it was there, then he was guilty."

11. The Court erred in instructing the jury as follows:

"The charge is a violation of a Federal Statute, and the very purpose of that statute was to protect the community against crimes of violence, and it provides that when a person is under charge of a crime of violence he may not during that period carry any firearm."

12. That the verdict is contrary to law.

II

Reasons Relied On for the Allowance of Writ

1. That the Circuit Court of Appeals for the First Circuit in rendering its decision in this case has decided an important question of Federal law which has not been, but should be, settled by this Court, to-wit: that the words "under indictment" as stated in Section 902(e), Title 15, U. S. C. A., is used not in its legal or technical sense, but is used in the general sense.

2. That the Circuit Court of Appeals for the First Circuit in rendering its decision in this case has decided a Federal question as to the deliberate and systematic exclusion of the names of wage-earners, negroes and women from the jury list in the District Court of the United States for the District of Puerto Rico was not in violation of the petitioner's right to an impartial jury, and in conflict with a decision of this Honorable Court rendered in the cases of *Thiel* v. *Southern Pacific Company*, 90 L. Ed. 922; *Ballard*

v. *United States*, 91 L. Ed. 195; *Smith* v. *Texas*, 311 U. S. 128; *Glasser* v. *U. S.*, 315 U. S. 60.

3. That the Circuit Court of Appeals for the First Circuit in rendering its decision in this case has decided a Federal question, in a way probably in conflict with the applicable decisions of this Court in that the selection of the petit jury to serve in the District Court of the United States for the District of Puerto Rico by the clerk and the jury commissioner from the membership of private and exclusive clubs and organizations was not so arbitrary as to violate the petitioner's right to due process under the Fifth Amendment and in conflict with the decisions of this Court in the cases of *Glasser* v. *U. S.*, 315 U. S. 60; *Smith* v. *Texas*, 311 U. S. 128; *Ballard* v. *U. S.*, 91 L. Ed. 195; *Thiel* v. *Southern Pacific*, 90 L. Ed. 922.

4. That the Circuit Court of Appeals for the First Circuit in rendering its decision in this case has decided that the instructions given by the District Court to the jury were not erroneous and prejudicial to the petitioner's right to a fair and impartial jury.

5. That the Circuit Court of Appeals for the First Circuit in rendering its decision failed to decide wherein the conduct of the District Attorney making remarks and argument were injurious to the petitioner's defense.

6. That the Circuit Court of Appeals for the First Circuit in rendering its decision in this case failed to take into consideration that the petitioner was acquitted for the crime of murder alleged in the indictment while the case was pending on appeal.

7. That the Circuit Court of Appeals for the First Circuit in rendering its decision in this case that the evidence was sufficient for the jury to convict the defendant is in

conflict with the decision of that Court in the case of *Ayala* v. *U. S.*, 268 Fed. 296.

8. That the decision of the Circuit Court of Appeals for the First Circuit holding that the transportation of a firearm and ammunition within the Territory of Puerto Rico is not in conflict with the local laws of Puerto Rico, and Congress in exercising police powers reserved the same to the Legislature of Puerto Rico.

III

Jurisdiction

1. That the date of judgment to be reviewed is March 18, 1947.

2. That the statutory provision which is believed to sustain the jurisdiction of this Court is the Act of February 13, 1925. Sec. 229 g 1(a), 43 Stat. 938. Rules of the Supreme Court adopted February 13, 1939.

3. That this is a criminal case in which petitioner herein was convicted by the District Court of the United States for Puerto Rico, appealed to the Circuit Court of Appeals for the First Circuit, and the Circuit Court of Appeals affirmed the judgment of the District Court.

IV

Questions Presented

1. That the words "under indictment" as stated in the Federal Firearms Act (15 U. S. C. A. 902(e)) is used in its legal or technical meaning and not in its generic form.

2. The deliberate exclusion of wage-earners, negroes and women from the jury list, violates petitioner's right to a fair jury trial.

3. The selection of names to serve in the petit jury from exclusive private clubs and organizations, violates petitioner's right to a fair jury trial.

4. Erroneous instructions.

5. Improper remarks by the District Attorney.

6. Insufficiency of evidence.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the First Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court had in the case numbered and entitled on its docket 4208, Fernando Quinones Jiminez, Defendant Appellant, vs. United States of America, Appellee, to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said Circuit Court be reversed by this Court, and for such further relief as this Court may deem proper and just.

Washington, D. C., April 10, 1947.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1251

FERNANDO QUINONES JIMENEZ,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent

BRIEF OF THE PETITIONER

Jurisdictional Statement

Jurisdiction in this Court is invoked under the provisions of the Act of February 13, 1925, 43 Stat. 938, Rules of the Supreme Court adopted on February 13, 1939.

The petitioner Fernando Quinones Jimenez was charged with two violations of the Federal Firearms Act (Title 15, U. S. C. A. 902(e)), consisting in that the petitioner on or about May 15, 1943, in Caguas, Puerto Rico, in the District of Puerto Rico within the jurisdiction of the United States District Court for Puerto Rico, who was then and there under an information for a crime of violence in the District Court for the judicial district of Humacao, Puerto Rico, to-wit, Criminal Case No. 18262, for first degree murder, did

unlawfully, knowingly and wilfully transport within the Territory of Puerto Rico a firearm and ammunition. A demurrer was filed by the petitioner and also a motion to strike the entire jury panel (see (Record, pp. 3 and 5).

The Court hearing testimony as to the motion to strike the jury panel denied both of them. The trial was held by jury and a verdict was rendered against this petitioner finding him guilty on both counts. Motion for a new trial and arrest of judgment was timely filed and argued. The petitioner was sentenced to serve a term of four years on the first count and four years on the second count, the sentence on the second count to be suspended, and the defendant placed on probation for a period of five years. An appeal from said verdict and judgment was taken by petitioner to the Circuit Court of Appeals and the Circuit Court of Appeals affirmed the judgment rendered by the District Court of Puerto Rico (see Record, pp. 136-143).

Questions Presented

1. That the words "under indictment" as stated in the Federal Firearms Act (15 U. S. C. A. 902(e)) is used in its legal or technical meaning and not in its general form.

2. The deliberate exclusion of wage-earners, negroes and women from the jury list violates petitioner's right to a fair jury trial.

3. The selections of names to serve in the petit jury from exclusive private clubs and organizations violates petitioner's right to a fair jury trial.

4. Erroneous instructions.

5. Improper remarks by the District Attorney.

6. Insufficiency of evidence.

Argument

I

The crucial question is whether the word "indictment" as stated in Section 902(e) of the Federal Firearms Act can be interpreted to cover the Territory of Puerto Rico where crimes of violence are charged by an information and not by indictment.

Section 902 comprises two violations, one, when a person is under an indictment, second, when a person has been convicted of a crime of violence. In the case at bar the defendant has never been convicted of a crime of violence. He was charged while under an information from a District Court of Puerto Rico of a crime of violence with the use and the carrying of a firearm and ammunition. The defendant while pending an appeal to the United States Circuit Court of Appeals was acquitted of the crime of violence charged in the indictment. The Circuit Court of Appeals held that the word "indictment" used in the Federal Firearms Act includes also informations. The decision of the Circuit Court of Appeals is erroneous as there is a substantial and marked difference in what is indictment and what is information.

> "An indictment is a formal accusation in writing made by a grand jury under oath and presented to a competent court, charging a person with a crime and stating its nature." *Grin* vs. *Shine*, 187 U. S. 181, 47 L. Ed. 130.
>
> "An indictment is an accusation in writing found and presented by a grand jury, legally convoked and sworn, to the court in which it is impanelled, charging that a person therein named has done some act, or been guilty of some omission, which by law is a public offense, punishable by indictment." *Black's Law Dictionary*, deluxe edition, 1944.
>
> "An indictment is a written accusation against one or more persons of a crime or misdemeanor, presented

to, and preferred upon oath or affirmation by a grand jury legally convoked." *Bouvier's Law Dictionary.*

"An information is a written accusation of crime preferred by a public prosecuting officer without the intervention of a grand jury. There were two kinds of criminal informations under the common-law procedure in England. The first was for an offense immediately against the King, filed by the Attorney General ex officio, and without leave of court, and the second was against private individuals and was exhibited by the masters of the Crown. Generally, the informations used in the United States are those of the first kind, and those of the second class seem never to have been used in some of our courts, notably the Federal courts. (27 Am. Jurisprudence, Vol. 587)."

Informations are made by the United States Attorney, or by his duly appointed assistants in his name, under his official oath of office, and by them alone (*Brown* v. *United States,* 287 F. 703, Cert. denied).

An information differs from an indictment in that the information is the allegation of the officer who exhibits it, and the indictment is found by the grand jury. The information can be amended by the officer, but the indictment can not be amended. When Congress used the words "under indictment" the same were used in the common law and legal or technical sense, that is, persons who were under a presentment of a grand jury. It is impossible to conceive that Congress intended the words "under indictment" to include information when instead of using the words "under indictment" it could easily have stated "under a charge," "under accusation," but when Congress used the word "indictment" in this penal statute the only conceivable meaning that the word "indictment" has is that the person must be under a charge of a grand jury.

The Circuit Court of Appeals for the Fourth Circuit in the case of *Hart* v. *U. S.,* 63 Fed. 249, has held, interpret-

ing a statute similar to the one we are interpreting, that the word "information" cannot be regarded as a substitute for an indictment within the meaning of the U. S. Rev. Stat., Sec. 5278, providing for the surrender of a fugitive from justice from another state. The court further held that the indictment had in mind by those who framed the Constitution and enacted the statute referred to was written accusation of one or more persons of a crime or misdemeanor preferred to and presented upon oath by a grand jury. This case is exactly on point that the words "under indictment" have only one meaning, not the generic meaning that the Circuit Court of Appeals for the First Circuit gave in deciding this case. The fact that that part of the statute will be of no avail in Puerto Rico is no argument, for Congress, if they want to include that persons who are charged with a crime of violence in Puerto Rico, can easily amend said statute, inserting the words "under a charge" and eliminating the words "under indictment." The language of the Federal Firearms Act is so clear that it manifests itself beyond any ambiguity, as it was held in the case of *U. S.* v. *Hartwell*, 18 L. Ed. 830, that if the language be clear it is conclusive.

We respectfully submit that the decision of the Circuit Court of Appeals for the First Circuit in the case of this petitioner and the decision of the United States Circuit Court of Appeals for the Fourth Circuit, *Hart* v. *U. S.*, 63 Fed. 249, are in conflict, and that the Supreme Court should intervene to decide this important federal question.

II

The clerk and the jury commissioner admitted that women's names were deliberately excluded from the jury box (see Record, p. 17). The following took place:

> "Q. Miss Aguayo, of the 800 jurors that you have placed in the jury box and that have answered, what

are these that you have brought to court today? A. I went through the list and I found these that looked to me like wage earners.

"Q. How many are there? A. Eight.

"Q. Now, Miss Aguayo, you say that Arturo N. Silva is a wage earner because he is a music teacher? A. Well, I really don't understand well what is a wage earner. I understood it was one who gets paid by the hour.

"Q. Now I ask you about this Mr. Jill? A. He is a mechanic foreman.

"Q. And Thomas Loft? A. He is also a mechanic foreman.

"Q. And Harold Weaver is a music teacher? A. Yes.

"Q. He lives in the Vidal Apartment in Miramar? A. I don't know that.

"Q. This is a wage earner too, an electric and mechanic superintendent? A. Yes.

"Q. Do you know if he is an executive? A. No, I don't know that."

As to negroes, the clerk testified that she did not exclude them, but her testimony, which appears in the record, shows that of the 800 jurors placed in the jury box only eight were wage-earners. So the record clearly shows that wage-earners were not included in the jury list, and this Court has held in the case of *Thiel* v. *Southern Pacific Co.*, 90 L. ed. 922, as follows.

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. . . . This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic

and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." 328 U. S.

The Supreme Court in the case of *Smith* v. *Texas*, 311 U. S. 128, held that a negro convicted of a crime based upon an indictment returned by a grand jury from which negroes were excluded because of their race is denied the equal protection guaranteed by the Fourteenth Amendment. This case is to the point, for of the 800 talesmen in the petit jury of Puerto Rico, only eight were wage earners. That means discrimination against wage earners. In that same case of *Smith* v. *Texas*, the Supreme Court held as follows:

"4. A charge of racial discrimination in the selection of grand jurors is supported by evidence that in a county in which negroes constitute over 20 per cent of the poll-tax payers, and a minimum of from 3,000 to 6,000 of them measure up to the statutory qualifications for grand jury service, only 18 of 512 persons summoned over an 8-year period for grand jury duty were negroes, that of the 18 the names of all but one were so far down on the list from which the grand jury was made up as to render it unlikely that they would be reached, that in fact only 5 ever served, and that of these 5 the same individual served three times, so that only 3 individual negroes served at all, whereas 379 of the 494 white men summoned actually served, and of 32 grand juries impaneled only 5 had negro members, and that while 2 of the 3 commissioners who drew the panel for the grand jury by which defendant was indicted denied that they intentionally, arbitrarily, or systematically discriminated against negro grand jurors as such, one said that their failure

to select negroes was because they did not know the names of any who were qualified, and the other said that he was not personally acquainted with any member of the negro race."

As to the case of women being excluded from the jury service, that was admitted by the clerk, and when the United States District Court of Puerto Rico was created, Section 867 of Title 48, U. S. C. A. stated as follows:

"Sec. 867. Juries in district court; qualifications.

The qualifications of jurors as fixed by the local laws of Porto Rico shall not apply to jurors selected to serve in the District Court of the United States for Porto Rico; but the qualifications required of jurors in said court shall be that each shall be of not less than twenty-one years and not over sixty-five years, a resident of Porto Rico for not less than one year; and have a sufficient knowledge of the English language to enable him to serve as a juror; they shall also be citizens of the United States. Juries for the said court shall be selected, drawn and subject to exemption in accordance with the laws of Congress regulating the same in the United States courts in so far as locally applicable. (June 25, 1906, c. 3542, 34 Stat. 466; Mar. 2, 1917, c. 145, g144, 39 Stat. 966)."

This section specifically states that the qualifications of jurors as fixed by the local laws of Puerto Rico shall not apply to jurors selected to serve in the District Court of the United States for Puerto Rico. To serve in the jury in the insular courts, the qualifications in accordance with Section 186 of the Code of Criminal Proceedings of Puerto Rico *is* to be a male citizen, 21 years of age and less than 70. This does not cover jurors to serve in the Federal Courts of Puerto Rico. The Supreme Court of the United States has decided this question in the recent case of *Ballard* v. *U. S.*, in that a systematic exclusion of women

from the panel was a departure from the scheme of jury selection which Congress adopted, and that as in the *Thiel* case "we should exercise our power of supervision over the administration of justice in the federal courts."

That same case held that

> "It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded."

Nevertheless in spite of what this court upheld in the case of *Ballard*, the Circuit Court of Appeals ignored the mandatory decision of this Court, and we respectfully submit that because of this error the petition for certiorari be granted.

III

The jury commissioner testified that certain blanks with questions to answer were sent to different clubs, and on page 13 of the Record, it shows as follows:

"Q. You said clubs; do you include the Rotary Club? A. No, I do not.

"Q. What clubs do you include? A. The Union Club, the Elks Club, the Casino de Puerto Rico, but they never sent me any lists. I even got some from the Casino Espanol.

"Q. Did you send that same request to the Federation of Labor office here in Puerto Rico? A. No."

And the clerk on page 8 of the Record stated as follows:

"Q. I ask you, to whom do you write to get these prospective names? A. To all the societies that I know about and the banks.

"Q. Organizations? A. Yes. Also to all the business concerns.

"Q. Have you ever sent a letter here in Puerto Rico to the American Federation of Labor to submit to you the names of persons? A. I am afraid I really don't know."

The record furnishes ample evidence establishing that the selection of jurors in Puerto Rico by the Clerk of the Court and the Jury Commissioner is discriminatory and abusive. The jury the way it is picked is not too representative of the community. In the case of *Glasser* v. *U. S.*, 315 U. S., p. 60, the court stated:

"The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial. No matter how high principled and imbued with a desire to inculcate public virtue such organiza-

> tions may be, the dangers inherent in such a method of selection are the more real when the members of those organizations from training or otherwise acquire a bias in favor of the prosecution. The jury selected from the membership of such an organization is then not only the organ of a special class, but, in addition, it is also openly partisan. If such practices are to be countenanced, the hard won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions."

The petitioner contends that this case of *Glasser* is absolutely in point, and that the decision of the Circuit Court of Appeals in holding that the petit jury was selected in accordance with law is erroneous and that this Court, because of the above reason, should grant the petition for certiorari.

IV

The instructions of the Court as they appear in the record (pp. 119-125), and as appear in the statement of points (p. 134), are erroneous as there is a fundamental difference between an information and an indictment, and the Court in charging the jury that they have indicted by information on the federal system created a confusion in their minds which was prejudicial to the interest of the petitioner. The Court's instruction as to transportation in effect was taking the case out of the hands of the jury and almost instructing them to bring a verdict for the government. The court assumed a fact that was one of the issues and said fact was not supported by the evidence. So in giving that instruction, the Court committed an error because it was assuming something that was the real issue of the case. We submit that this instruction was erroneous and that the judgment of that court should have been reversed because of this reason.

V

The District Attorney made a statement to the jury that the defendant had approached the petit jury to influence their decision. This statement of the District Attorney affected the minds of the jury and it was held in the case of *Volkmor* v. *United States*, 13 F. (2nd) 594, that a judgment of conviction was reversed solely because the United States Attorney's improper and abusive characterizations and references to the defendant during his summation as a skunk and weak-faced weasel, and a cheap, scaly, and slimy crook. The Court said:

> "Admitting that these statements were wholly unjustifiable—as indeed must be done—the government contends that, as defendant failed to ask for exceptions, the error is not available. In the first place, there was no adverse ruling on the objections, and in that situation an exception was a matter of dubious propriety. But, even if there had been no objection, it was the duty of the court, on its own motion, to reprove counsel and to instruct the jury to disregard the remarks. This is not a case of inadvertence of statement, but of intentional abuse. It was only after repeated objections of counsel for defendant, and the court's admonition—that 'I think you will make better progress by sticking to the facts of the case,' that the remarks were withdrawn. Neither the withdrawal nor the admonition could remove the effect of the error."

An improper and prejudicial opening address by the United States Attorney may be held by an appellate Court to warrant a reversal of a judgment of conviction. Thus in *Minker* v. *United States* (85 F. 2d 425), the defendant-appellant who was the only one of fifty-four defendants arraigned under a conspiracy indictment who did not withdraw his plea of not guilty and enter a plea of guilty or *nolo contendere*, on appeal from a judgment of conviction

assigned as error the remarks of the prosecuting attorney in his opening statement to the Court and jury. The Court said that "in view of the prejudicial atmosphere surrounding the case, the unfair arguments of the prosecuting attorney, and the improper admission of the books of account in evidence, we think the appellant was not accorded a fair trial," and reversed the judgment with a *venire de novo.*

> " 'The United States Attorney is the representative not of an ordinary part to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' *Berger* v. *United States, supra.* 'Public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice.' *N. Y. Central R. Co.* v. *Johnson, supra,* 279 U. S. 310, 318, 49 S. Ct. 300, 73 L. ed. 706. Where such paramount considerations are involved, procedural niceties will not preclude a court from correcting error."

Remarks of the prosecuting attorney which tend to excite prejudice in the minds of the jury are improper and are ground for reversal. (*N. Y. Central R. Company* v. *Johnson,* 279 U. S. 310, 73 L. ed. 706.)

VI

The evidence submitted to sustain the allegation of indictment established that a truck was parked in front of Manrique's warehouse at Caguas, Puerto Rico, and that shots were exchanged between Candido Martinez, deceased, and Fernando Quinones Jimenez. That after the shooting

Mr. Quinones left in the truck, but there is no evidence tending to establish whether he had the revolver with him in the truck or when he arrived at that place in the truck he was carrying said revolver. The only evidence to clarify those issued was the evidence of the defendant which established that Fernando Quinones Jimenez arrived at that place in that truck and he did not know that he was carrying the revolver. That Candido Martinez fired shots against Quinones and that Quinones tried to hide in the truck when a person named Juan Puig delivered him a revolver and without moving, he fired in self defense to protect his life. That he threw the revolver, he did not know where, and that he left in the truck (R. 107, 108, 109, 110, 111, 112 and 113).

That evidence is not sufficient to establish the guilt of the defendant beyond a reasonable doubt. This Court held in the case of *Ayala* v. *United States,* 268 F. 296, as follows:

> "While it is in the province of the jury to draw inference which may reasonably be drawn from the evidence, there is not substantial evidence to support a conviction, where inferences as consistent with innocence as with guilt may be drawn from the proven facts."

The defendant is presumed to be innocent until he is proven guilty beyond a reasonable doubt, and the burden of proof is upon the government. Consequently, evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction and unless there is substantial evidence of facts which excluded every reasonable hypothesis but guilt, it is the duty of the trial court to instruct the jury to return a verdict for the defendant. *Edwards* v. *United States,* 7 F. (2nd) 357. *Wright* v. *United States,* 227 F. 855.

The verdict of a jury must be sustained if there is substantial evidence taking the view most favorable to the government to support it. *U. S.* v. ***Manton,*** 107 F. (2d) 834.

We contend that the evidence is not sufficient to sustain the verdict and that the Circuit Court of Appeals committed a serious error in sustaining the judgment of the lower court.

Conclusion

The decision of the Circuit Court of Appeals is erroneous, and there is an important federal question as to the words "under indictment" and also as to the way the petit jury is selected in Puerto Rico, and as to the deliberate exclusion of wage-earners, negroes and women from the jury box, all of great importance, to be decided by this Court, and we respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 9, 1947.

INDEX

CITATIONS

743108—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1251

FERNANDO QUINONES JIMINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 136–143) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered March 18, 1947 (R. 143). The petition for a writ of certiorari was filed April 15, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether Section 2 (e) of the Federal Firearms Act, prohibiting the interstate or intraterritorial transportation of firearms by persons under indictment in any federal, state, or territorial court for a crime of violence, applies to one against whom a criminal information is pending in a Puerto Rico territorial court charging first degree murder, the filing of an information being the only method of charging a crime in the territorial courts of Puerto Rico.

2. Whether women are eligible for jury service in the District Court of the United States for Puerto Rico.

3. Whether the evidence is sufficient to sustain the verdict.

STATUTE INVOLVED

The Federal Firearms Act of June 30, 1938, c. 850, 52 Stat. 1250, provides in pertinent part as follows:

> SEC. 1 [15 U. S. C. 901]. * * * as used in this Act—
>
> * * * * * *
>
> (2) The term "interstate or foreign commerce" means commerce between any State, Territory, or possession * * *, or the District of Columbia, and any place outside thereof; * * * or within any Territory or possession or the District of Columbia.
>
> * * * * * *

(6) The term "crime of violence" means murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year.

* * * * *

SEC. 2 [15 U. S. C. 902]. * * *

* * * * *

(d) It shall be unlawful for any person to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition to any person knowing or having reasonable cause to believe that such person is under indictment or has been convicted in any court of the United States, the several States, Territories, possessions * * *, or the District of Columbia of a crime of violence * * *.

(e) It shall be unlawful for any person who is under indictment or who has been convicted of a crime of violence * * * to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition.

* * * * *

SEC. 5. [15 U. S. C. 905]. Any person violating any of the provisions of this Act * * * shall, upon conviction thereof, be fined not more than $2,000, or imprisoned for not more than five years, or both.

STATEMENT

On December 12, 1945, an indictment in two counts (R. 1–3) was filed in the District Court of the United States for Puerto Rico charging that petitioner, on or about May 15, 1943, while under indictment for first degree murder in the District Court for the Judicial District of Humacao, Puerto Rico, transported within the territory of Puerto Rico a firearm (count 1) and firearm ammunition (count 2), in violation of Sections 2 (e) and 5 of the Federal Firearms Act, *supra*. After a trial by jury, petitioner was found guilty on both counts (R. 19, 125), and he was sentenced to imprisonment for a term of four years on each, to run consecutively; execution of the sentence on count 2 was suspended and petitioner was placed on probation for a period of five years following completion of service of the sentence on count 1 (R. 129). On appeal to the Circuit Court of Appeals for the First Circuit, the judgment of conviction was affirmed (R. 143).

The evidence against petitioner was, in brief, as follows:

At approximately 5 p. m. on May 15, 1943, petitioner drove a truck into Jiminez Sicardo Street in Caguas, Puerto Rico, and parked in front of a lumber warehouse. There was a revolver in the glove compartment of the truck. After transacting some business in the warehouse, petitioner was standing on the sidewalk beside

the truck when he suddenly stepped into the cab of the truck for a moment, stepped out again on to the sidewalk, and started shooting at one Martinez, who was also standing on the sidewalk a short distance away. (R. 59–60, 65–66, 71, 107.) A shooting duel ensued when Martinez also drew a revolver, returned petitioner's fire, and was wounded (R. 65–66). After several shots had been exchanged, petitioner threw his revolver on the truck seat, helped a wounded companion into the truck, and drove away (R. 66, 71, 75, 80).

At the time of this incident, an information was pending in the District Court of Humacao, a Puerto Rico territorial court, charging petitioner with first degree murder (R. 54–55).

At some time following the shooting incident and prior to a trial involving petitioner which occurred previously to the trial below, petitioner approached one Tomasa Ortiz, a witness of the shooting, asked her if she had been served with a summons to appear at the earlier trial, questioned her in respect of her version of the shooting incident, told her that her story was a lie, and asked her not to state in court that he had gone to see her. In respect of the revolver which he had used in the shooting, he told her that he "carried the revolver in the truck," and that "when Mr. Martinez appeared he rushed to the truck to get the revolver." (R. 67.)

ARGUMENT

1. Petitioner contends that his acts of transporting a firearm and firearm ammunition within the territory of Puerto Rico were not offenses within the purview of Section 2 (e) of the Federal Firearms Act (*supra*, p. 3) because he was not, as required by the terms of the section, under "indictment" for a crime of violence at the time, but had, rather, been charged with such a crime by the filing of an information (Pet. 5, 11–13). Petitioner's argument is based on the premise that the word "indictment," as used in the section, must necessarily, and in all circumstances, be given its strict, common-law meaning of an accusation of crime presented by a grand jury. We submit, however, that this premise is untenable and would lead to absurd results.

In the territorial courts of Puerto Rico, the institution of the grand jury is unknown; the prosecution of all crimes, regardless of their gravity, is commenced by the filing of an information by the prosecuting attorney. Puerto Rico Code of Criminal Procedure, 1935, §§ 67, 68, 72. If petitioner's argument is sound, therefore, it follows that Section 2 (e) of the Firearms Act does not and can never apply to the transportation of firearms by a person charged with a crime of violence, however grave, in a territorial court of Puerto Rico. The congressional intent, however, to proscribe and punish the interstate or

intraterritorial transportation (Section 1 (2)) of firearms by all persons who have been convicted of, or charged with, any crime of violence "in *any* court of the United States, the several States, Territories, possessions * * *, or the District of Columbia" [italics supplied], is not reasonably susceptible of doubt. Compare Section 2 (e) with Section 2 (d), *supra*, p. 3. The logic of petitioner's argument impels the conclusion that, whereas persons charged with comparatively minor crimes of violence (see Section 1 (6)) in federal courts and all state and territorial courts in which the indictment is the common means of commencing felony prosecutions are forbidden to transport firearms in interstate or intraterritorial commerce, a person formally charged with even the most serious crime of violence, first degree murder, in one of the Puerto Rico territorial courts may so transport firearms with complete impunity by virtue of the technical fact that in those courts the filing of an information, rather than the presentment of an indictment, is the normal, and, indeed, the only known method of commencing all criminal prosecutions. In view of the manifest purpose of the Firearms Act as a whole to keep deadly weapons out of dangerous hands, the insubstantiality of such a conclusion is apparent. As this Court has had frequent occasion to remind, conduct clearly intended by Congress to come within the sphere of proscribed

activities should not, by overstrict judicial construction, be held to lie without that sphere. *United States* v. *Gaskin*, 320 U. S. 527, 529–530; *United States* v. *Dotterweich*, 320 U. S. 277, 281–283; *United States* v. *Raynor*, 302 U. S. 540, 552; *United States* v. *Corbett*, 215 U. S. 233, 242; *United States* v. *Hartwell*, 6 Wall. 385, 396. The only sensible way to construe the word "indictment" in Section 2 (e), we submit, is to give it its generic meaning of formal charge or accusation (see "indictment" as defined in *Century Dictionary and Cyclopedia*, 1911; Funk & Wagnalls, *New Standard Dictionary of the English Language*, 1937; Murray, *New English Dictionary*, 1901; Webster's *New International Dictionary*, 2d ed.; cf. *Grin* v. *Shine*, 187 U. S. 181, 192), whether the accusation be by a grand jury or by an information filed by the prosecuting attorney, as the one or the other mode of initiating criminal prosecutions may be prescribed by law in a given jurisdiction. The propriety of so construing the term in the interest of effectuating the general purpose and intent of the legislation as a whole is clear, since it is well settled that a term in a penal statute need not be given its narrowest possible meaning. *Singer* v. *United States*, 323 U. S. 338, 341–342; *United States* v. *Raynor*, *supra*, 552; *United States* v. *Giles*, 300 U. S. 41, 48.

2. Petitioner further contends (Pet. 5–6, 13–17) that the trial court erred in denying his

motion to strike the entire jury panel on the ground that women were excluded from the jury list on account of sex (see R. 5, 19). The contention is without merit.

It is not disputed that women are systematically excluded from the jury lists in the District Court for Puerto Rico (see R. 7, 11, 15). This is proper practice, however. In *Crowley* v. *United States*, 194 U. S. 461, 467, decided in 1904, this Court held that under Sections 14 and 34 of the Foraker Act of April 12, 1900, c. 191, 31 Stat. 77 (the Puerto Rico Organic Act), the required qualifications for jury service in the District Court for Puerto Rico were the same as those in the local courts of Puerto Rico, as prescribed by local law. Women were then (Puerto Rico Revised Statutes and Codes, 1902, pp. 172–173) and still are (Puerto Rico Code of Criminal Procedure, 1935, §§ 186–187) specifically declared ineligible for jury service in the local courts of Puerto Rico. Consequently, unless the Act of June 25, 1906, c. 3542, 34 Stat. 466, upon which petitioner relies, made women eligible for jury service in the District Court for Puerto Rico, they are still ineligible. That Act provides in pertinent part as follows:

> That the qualifications of jurors as fixed by the local laws of Porto Rico shall not apply to jurors selected to serve in the district court of the United States for

> Porto Rico, but that the qualifications required of jurors in said court shall be that each shall be of the age of twenty-one years and not over sixty-five years, a resident of Porto Rico for not less than one year, and having a sufficient knowledge of the English language to enable him to duly serve as a juror: * * *.[1]

Congress manifestly did not, by this Act, expressly make women eligible for jury service in the District Court for Puerto Rico. And it is equally clear, for the compelling reasons stated by the court below (R. 141),[2] that Congress had no intention whatever to make women eligible by negative implication. Indeed it is plain from the legislative history of the Act, as indicated by the court below (R. 140, fn. 1), that its principal, if not its sole purpose was to eliminate knowledge of the Spanish language as an eligibility requisite for jury service in the District Court for Puerto Rico, such knowledge being required for such

[1] This Act has been amended, but in no respect here material. See 48 U. S. C. 867.

[2] The court below pointed out that the first State to permit women to serve on its juries, Kansas, did not do so until 1913, seven years after the enactment of this Act; that it was impossible to believe that Congress was pioneering in the movement to put women on juries without so expressing itself in unmistakable terms; that it could not be assumed that Congress would require women on federal juries in a community where local law does not impose the burden of jury service upon them, particularly in a community with a cultural and social background so different from our own.

service in the local courts, because of the difficulty experienced in finding adequate numbers of persons who had a sufficient command of English to serve on juries in the District Court for Puerto Rico and who were also qualified for local jury service. S. Rep. No. 3474, 59th Cong., 1st sess.; H. Rep. No. 4218, *id.* The present case, therefore, is clearly distinguishable from *Ballard* v. *United States*, 329 U. S. 187.[3]

3. Petitioner's contention that the evidence is insufficient to support the verdict (Pet. 6–7, 21–23) is based on the assumption that the jury were bound to believe the testimony of the defense witnesses. The evidence pointing to petitioner's guilt, summarized in the Statement, *supra*, plainly warranted the verdict of guilty.[4]

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[3] Petitioner also contends that Negroes and wage earners were systematically excluded from the jury list (Pet. 5, 7, 10, 14), but, as observed by the court below (R. 139), the contention is unsupported by the record. In respect of Negroes, see R. 8, 14; in respect of wage earners, see R. 7, 8–9, 14, 15. Petitioner's further contention that the jury did not represent a true cross-section of the community because prospective jurors were sought from exclusive private clubs and organizations (Pet. 6, 8, 10, 18–19) is likewise without merit. The record clearly reflects that the clerk and jury commissioner made every effort to secure names of English-speaking persons for jury service from every practicable source (R. 8–9, 13, 14, 15, 16, 17–19).

[4] Petitioner's further contention (Pet. 8, 19) that the trial court erroneously charged the jury on the issue of what constituted transportation within the meaning of Section 2 (e) is clearly without merit (cf. R. 123 with R. 125). As the court below observed (R. 143), moreover, petitioner's counsel

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court. We therefore respectfully submit that it should be denied.

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MAY 1947.

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expressed satisfaction with the charge on the transportation question (see R. 125). Petitioner's assertion (Pet. 20) that the prosecuting attorney made a statement to the jury that petitioner had approached the petit jury to influence their decision is unsupported by the record.

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